INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	2
Argument	14
Conclusion	21
Appendix A	22
Appendix B	25

CITATIONS

Cases:

Angelus Milling Co. v. *Commissioner*, 325 U. S. 293	19
Comstock v. *Group of Institutional Investors*, 335 U. S. 211	14
Cosmopolitan Shipping Co., Inc. v. *McAllister*, 337 U. S. 783	16, 18
Fink v. *Shepard Steamship Co.*, 337 U. S. 810	18
Fox v. *Alcoa S. S. Co.*, 143 F. 2d 667, certiorari denied, 323 U. S. 788	19
Gaynor v. *Agwilines, Inc.*, 337 U. S. 810	18
Hoiness v. *United States*, 335 U. S. 297	13, 20
KVOS, Inc. v. *Associated Press*, 299 U. S. 269	18
Mahnich v. *Southern S. S. Co.*, 321 U. S. 96	14
McInnis v. *United States*, 152 F. 2d 387	19
McNutt v. *General Motors Acceptance Corp.*, 298 U. S. 178	18
Militano v. *United States*, 156 F. 2d 599	19
Orr v. *United States*, 174 F. 2d 577	21
Sloan Shipyards v. *U. S. Fleet Corp.*, 258 U. S. 549	16
United States v. *Corrick*, 298 U. S. 435	18
Untersinger v. *United States*, 172 F. 2d 298	21
Wetmore v. *Rymer*, 169 U. S. 115	18

Statutes:

Clarification Act of March 24, 1943, Sec. 1, 57 Stat. 45, 50 U.S.C. App. 1291	2, 3, 15, 22
R. S. 1753, 5 U.S.C. 631	3
Suits in Admiralty Act, 46 U.S.C. 741-752	2
Sec. 2	3, 12, 13, 20, 24
Sec. 5	4, 16, 24

Miscellaneous:

Civil Service Rules, Schedule A: Sec. xxi (1), 5 CFR, 1943 Cum. Supp. 1488, sec. 50.21	3
5 Cyc. of Federal Procedure (1943 ed.) § 1567	18
Executive Order No. 9004, 7 F. R. 2	3
Executive Order No. 9054, 7 F. R. 837	3
General Order 32, issued April 22, 1943, 8 Fed. Reg. 5414	2, 15
Sec. 304.21	25
Sec. 304.22	25
Sec. 304.23	4, 26
Sec. 304.24	4, 26
Sec. 304.25	4, 26
Sec. 304.26	5, 27
Rule 12(h)(2), Federal Rules of Civil Procedure	18
War Shipping Administration Operations Regulations No. 12, Supplement No. 1, October 7, 1944	3

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 150 Misc.

GEORGE RODINCIUC, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania (Pet. A. 6a),[1] is reported at 74 F. Supp. 284. The opinion of the United States Court of Appeals for the Third Circuit is reported at 175 F. 2d 479.

JURISDICTION

The judgment of the Court of Appeals was entered on May 31, 1949. A petition for rehearing,

[1] The "Appendix to Brief for Appellant," "Appellant's Supplemental Appendix," and "Appendix to Brief for Appellee" will be referred to herein respectively as: (Pet. A.), (Pet. SA), and (RA).

filed June 15, 1949, was denied on June 22, 1949. The time within which to file a petition for a writ of certiorari was extended by order of Mr. Justice Burton to and including September 29, 1949. The petition for a writ of certiorari was filed on September 28, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, on the particular facts of this case, both courts below erred in dismissing petitioner's libel for lack of jurisdiction on the ground that petitioner failed to file a proper administrative claim in compliance with General Order 32, 8 Fed. Reg. 5414, issued by the War Shipping Administrator pursuant to the Clarification Act, 50 U.S.C. App. 1291.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the War Shipping Administration (Clarification) Act of March 24, 1943, 57 Stat. 45, 50 U.S.C. App. 1291, and of the Suits in Admiralty Act, 46 U.S.C. 741-752, are set forth in Appendix A, *infra,* pp. 22-24. General Order 32, 8 Fed. Reg. 5414, issued by the War Shipping Administrator pursuant to the Clarification Act, is set forth in Appendix B, *infra,* pp. 25-27.

STATEMENT

1. *Introductory Statement.* This is a suit by a civil service seaman against the United States under the Suits in Admiralty Act, 46 U.S.C. 741-752, and the Clarification Act, 50 U.S.C. App. 1291, to recover for injuries allegedly sustained while a member of the crew of the S.S. *William Williams,* a vessel owned and operated by the United States

through the War Shipping Administration.[2] The libel alleged that the vessel was torpedoed on May 2, 1943, and that petitioner was injured as a result thereof. The libel further alleged that petitioner was again injured on May 18, 1943, in the course of his employment (RA. 1a-4a). Three causes of action were ultimately stated by the amended libel: (1) Damages arising from negligence and from unseaworthiness of the vessel; (2) maintenance and cure and wages; (3) War Risk Insurance benefits. The district court dismissed the libel for want of jurisdiction on two grounds; (a) failure of petitioner to prove residence in the district, as required by Section 2 of the Suits in Admiralty Act (*infra*, p. 24); (b) failure to file a proper claim under the Clarification Act. On appeal, the court below affirmed.

2. *Background.* The Clarification Act of March 24, 1943, *infra*, pp. 22-24, grants to officers and members of crews on United States vessels "all of the rights, benefits, exemptions, privileges, and liabilities, under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels." Section 1 provides that claims "shall, if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act", and

[2] By virtue of this government employment on a government operated vessel, petitioner's technical status was that of an unclassified civil service employee of the United States. Civil Service Rules, Schedule A, sec. xxi (1), 5 CFR, 1943 Cum. Supp. 1488, sec. 50.21 (Executive Order No. 9004, 7 F.R. 2, Executive Order No. 9054, 7 F.R. 837), established by the President under authority of R.S. 1753 (5 U.S.C. 631); see also, War Shipping Administration Operations Regulations No. 12, Supplement No. 1, October 7, 1944.

defines the term administratively disallowed to mean a "denial of a written claim in accordance with rules or regulations prescribed by the Administrator, War Shipping Administration." (50 U.S.C. App. 1291). Section 5 of the Suits in Admiralty Act, *infra*, p. 24, declares that suit "shall be brought within two years after the cause of action arises."

On April 22, 1943, the War Shipping Administrator issued General Order 32, 8 Fed. Reg. 5414, *infra*, pp. 25-27, which provides in pertinent part as follows:

> 304.23 *Court action, condition precedent.* No seaman * * * shall commence a court action for the enforcement of such claim, unless such claim has been filed by him or on his behalf * * * as provided in Sections 304.24 and 304.25 and has been administratively disallowed by the person or agency with whom it was so filed.
>
> 304.24 *Claim, contents.* The claim need not follow any particular form, but it shall be in writing. It shall contain such particulars as are reasonably necessary as a basis for the allowance or administrative disallowance of such claim and should include * * * all the facts or circumstances leading up to and surrounding the happening of the event out of which it is alleged the claim arose.
>
> 304.25 *Claims, with whom filed.* Claims based upon * * * any insurance policy issued by the War Shipping Administration, * * * shall be filed with the Chief Adjuster, Division of Wartime Insurance, War Shipping

* * *. All other claims * * * shall be filed with the General Agent of the vessel with respect to which such claims arose, or such Agent's Berth Sub-Agent to which the former may refer the claim for handling.

304.26 *Claim, when presumed administratively disallowed.* If the person or agency with whom the claim is filed, in accordance with the directions contained herein, fails to notify the claimant in writing of a determination upon such claim, within sixty days following the date of filing thereof, the claim shall be presumed to have been administratively disallowed, and the claimant shall be entitled to enforce his claim by court action.

3. *Correspondence.* On October 25, 1943, proctors for petitioner notified the Isthmian Steamship Company, the General Agent herein, that (Pet. SA. 14a):

> We represent George Rodineiue who was an oiler on board your S.S. *William Williams* when he sustained personal injuries following the torpedoing of the vessel and when on or about May 18, 1943 he suffered personal injuries while keying up the I.P. bearing.
>
> Please advise us whether you are inclined to adjust this matter amicably.

In reply, on October 26, 1943, the General Agent requested proctors for petitioner to (Pet. SA. 15a):

> * * * furnish us with full details as to the time, place and cause of the accident and also furnish us with the original of the hospital abstract.

On October 27, 1943, proctors for petitioner stated that (Pet. SA. 16a):

> * * * we certainly are at a loss to understand why you asked us to furnish you full details as to the time, place and cause of accident when you have complete information. If you contend that you have no such information, we would ask that you advise us as to that fact.
>
> In addition to all this, Mr. Rodinciuc was examined by your officers following the torpedoing and you must have that information also. * * *

On October 30, 1943, the General Agent repeated its prior request (Pet. SA. 17a):

> It is necessary that your claim stipulate exactly what is claimed for. If you have two claims, one for war risk injury and another for normal injuries, those claims are, of course, to be segregated.
>
> We also require the clinical abstract indicating the treatments for both injuries and the present status.
>
> As you are undoubtedly aware, we are acting as Agents for the War Shipping Administration, and this information is necessary before we can recommend a settlement.

To this letter, proctors for petitioner, on November 1, 1943, answered that (Pet. SA. 18a):

> We agree that the two claims are to be segregated but we do not understand what information you require from us with respect to the war risk injury. * * *

On November 2, 1943, the General Agent stated that (Pet. SA. 19a):

> Inasmuch as you appear to have two claims in connection with this man and in order to avoid further correspondence leading up to the possible settlement, we suggest that you let us have the original abstract from the Marine Hospital which we trust will completely segregate the two injuries alleged to have been sustained after which we will then correspond with you for whatever further information we may need.

On November 29, 1943, instead of furnishing the requested original abstract from the Marine Hospital, proctors for petitioner supplied a medical diagnosis of undesignated origin and declared that (Pet. SA. 20a):

> All of these injuries with the exception of the second one were sustained in a torpedoing. The second injury was sustained on or about May 18, 1943, while keying up the I.P. bearing. We call your attention to the correspondence in this matter, and we note that you have not made it clear as to what information you require from us with respect to the war risk injury.
>
> * * * We also note that you [sic] position with regard to the injuries sustained by Mr. Rodineiuc while he was keying up the I.P. bearing is not quite clear. * * *

On December 1, 1943, the General Agent reiterated that (Pet. SA. 21a):

> * * * As previously advised, it is necessary

> that we have the original clinical abstract from the Marine Hospital and we suggest that you forward same at your early convenience.
>
> We will also need some details as to the man's version of how he sustained his injury. He should state where he was at the time of accident, what he was doing, how he was hurt, whether he reported the matter to any of the ship's officers and if so to whom, what treatment he received and where.
>
> After we are successful in establishing the necessary details in connection with the war risk injury, we can then give consideration to the claim for injury to the left index finger not attributable to the war risk injury.

On December 2, 1943, proctors for petitioner replied that (Pet. SA. 22a):

> * * * we are unable to understand what you desire us to do. Will you please inform us precisely what information you request concerning the injuries which he sustained as a result of war-like operations; will you please inform us precisely what information you request concerning the injury which was not sustained during a war-like operation.

On December 3, 1943, the General Agent regretted that its letter of December 1 was not clear and again advised that (Pet. SA. 23a):

> * * * we will require the original abstract of the clinical record from the Marine Hospital where this man was treated, at the same time, or later if you prefer, we should have a complete statement by this man out-

lining when and how his injuries were sustained and to whom they were reported.

No answer was made by proctors for petitioner to this letter.

A year later, on December 29, 1944, proctors for petitioner wrote to the War Shipping Administration and asked to be advised whether the claim for War Risk Insurance benefits was being allowed. The letter informed War Shipping Administration that (Pet. SA. 24a):

> We represent Mr. George Rodinciuc who was an oiler on board the S.S. *William Williams* when on or about May 2, 1943, it was attacked by the enemy. As the result of this attack, Mr. Rodinciuc sustained an injury to the left brachial nerve plexus; traumatic arthritis; left sacroiliac joint; fracture of 3rd lumbar transverse process, right; rupture of left ear drum; fracture of the nasal bones; and other injuries. Full details of this claim has [sic] been furnished to Isthmian Steamship Company. * * *

On January 12, 1945, more than three months prior to the expiration date of the two-year statute of limitations, the Division of Wartime Insurance, War Shipping Administration, acknowledged receipt of proctors' letter of December 29, but regretted that (Pet. SA. 25a):

> * * * upon the meager facts contained in our file we can make no determination with respect to the question of whether Mr. Rodinciuc's injury is compensable under the applicable insurance contract. If you would be kind enough to furnish us with the com-

plete history of this unfortunate incident, this matter will then be given our immediate attention.

I should like to take this occasion to point out that, if by your letter under reply you are attempting to file claim under Public Law 17 or the Jones Act, compliance has not been had with the provision of General Order No. 32, a copy of which is enclosed herewith for your information. [Emphasis added]

On May 15, 1945, *after the statute of limitation had run,* proctors for libelant supplied the first statement of the facts of his claim by a letter to the War Shipping Administration containing the following information (Pet. SA. 26a):

* * * * *

George Rodinciuc was employed as an oiler on board the S.S. "William Williams" in San Francisco on February 18th, 1943 at the rate of $110. per month plus bonus. On May 2nd, 1943, while the vessel was en route to an island in the Solomon group, it was torpedoed by an enemy submarine. At the time, the claimant was on the deck and as a result of the explosion he was hurled into the air and in falling, he landed on the deck, striking a number of the ship's structures, as a result of which he injured his nose, his left ear, left arm and back among other general injuries. The vessel was not lost, but managed to make port and on arrival at Souva, he asked for permission, on May 9th, to go ashore for medical attention or to have a doctor brought aboard. His request was denied despite the fact that he was in obvious

pain and that his ear was running. He was required to continue with his duties and subsequently while keying up on the I.P. bearing, he injured his index finger on the left hand.

He was removed from the S/S *William Williams* at New Zealand and the next day, August 20th, 1943, he sailed on the M/S "Cape Feare" on which vessel he was returned as a survivor to San Francisco where he was paid off.

* * * * *

We enclose herein copies of the medical reports of the U.S. Marine Hospital in Cleveland, of the U.S. Public Health Service Relief Station in Philadelphia, and of Dr. A. Myers, all of which show that the claimant is afflicted with a serious nose and ear condition, in addition to a severe injury to his back which as you will note from the report is of a progressive nature.

* * * * *

On September 13, 1945, a letter of similar content was written to the General Agent (Pet. SA. 38a).

4. *Proceedings below.* On January 2, 1945, proctors for petitioner filed a libel in the United States District Court for the Eastern District of Pennsylvania (Pet. A. 1a). The libel set forth two causes of action, the first for damages arising from negligence and from unseaworthiness of the vessel and the second for maintenance and cure and wages; it alleged that demand for the payment of damages and maintenance and cure had been made but had been refused (RA. 1a-4a). *Inter alia* it

was alleged that libelant-petitioner was a resident of Philadelphia (RA. 1a).

On February 5, 1946, more than two years after the torpedoing on May 2, 1943, an amended libel, repeating the allegation of residence of libelant-petitioner in Philadelphia, was filed (RA. 8a). A third cause of action for War Risk Insurance benefits was added for the first time, as well as an allegation that demand had been made for the proceeds of War Risk Insurance but had been denied (RA. 8a-12a).

On February 20, 1946, the United States amended its answer to plead limitations as to the new cause of action for War Risk Insurance and to deny petitioner's allegation of residence in Philadelphia (RA. 21); and at the outset of trial, the United States demanded that proof be made of residence (Pet. A. 4a). Petitioner contended that the denial of residence, at most, raised a question of venue, rather than jurisdiction, under Section 2 of the Suits in Admiralty Act, *infra*, p. 24, and that the United States, by entering a general appearance and by pleading to the merits, waived any objection it might have had thereto (Pet. A. 4a).

After the proofs were closed, the trial court dismissed the libel for lack of jurisdiction on two grounds: (a) The court found that petitioner had not proved that, at the time the libel was filed, he was a resident of Philadelphia, or of any other place within the district in which the court sat, and that, in fact, petitioner, immediately prior to the filing of the libel and at all times thereafter, was a resident of Lorain, Ohio. The court concluded that (Pet. A. 9a):

> Even if the libellant is right in his contention that the denial of his allegation of residence raises a question of venue, the respondent, by entering a general appearance and by defending on the merits, did not waive its objection to the venue. The fact that the libellant did not reside within this district did not appear on the face of the libel, and therefore the respondent was unable to file exceptions to the libel on that ground. The most it could do is deny the allegation of residence and await the proof of such allegation at the trial [citations].

The trial court then went on to hold that the averment of residence under Section 2 of the Suits in Admiralty Act, *infra*, p. 24, went to the jurisdiction of the court, rather than venue and required dismissal. (b) The court added that while this disposed of the case "it is nonetheless pointed out that compliance was not had with the Clarification Act." Petitioner having failed to file a proper claim thereunder, suit was precluded.

On appeal, the court below affirmed. As to the first reason given by the district court, the court below noted that the decision of this Court in *Hoiness* v. *United States*, 335 U.S. 297, which decision was announced subsequent to the dismissal of the libel herein, construed Section 2 of the Suits in Admiralty Act, as a venue provision, and concluded that "the dismissal cannot, therefore, stand on the ground that the statute referred to is jurisdictional, and the objection to venue must be taken to have been waived by the respondent when it failed to object thereto" (175 F. 2d

479, 480). On the issue of compliance with the Clarification Act, the court below declared that "the present case offers no close question on this point. Until May 15, 1945, the libelant did not file a claim with the War Shipping Administrator which complied at all with the administrative regulations. The District Court so held, and our independent examination of the correspondence between the parties compels the same conclusion" (*Id.* at 481-482).

ARGUMENT

1. The basic question here involved is factual and not of general importance. Both courts below have found that petitioner's failure to comply with General Order 32, issued by the War Shipping Administrator under the Clarification Act, is clear. In the absence of a very exceptional showing of error, such concurrent findings of fact will not be reexamined by this Court. *Comstock* v. *Group of Institutional Investors,* 335 U. S. 211, 214, and cases there cited; *Mahnich* v. *Southern S.S. Co.,* 321 U. S. 96, 98-9.

It is unnecessary to comment extensively upon the record; the correspondence between the parties speaks for itself. As the court below observed (175 F. 2d 479, 482) "the failure to file a claim which would have complied with the regulations was not in this case a minor omission nor was it the result of a single mistake or oversight. Nor was it a case where a seaman, ignorant of the law, was not in a position to enforce his rights. He was represented throughout by highly experienced and competent counsel. The libelant was advised repeatedly, beginning in October, 1943, to set forth the facts on which his claim was based. The Ad-

ministrator's General Order 32, which was issued April 22, 1943, plainly requires such a statement of facts, although no particular form is specified. The libelant did not comply. * * * [The letter of the Administrator to proctors for petitioner on January 12, 1945] [*supra,* p. 10] pointed out in unmistakable terms that if a claim under the Clarification Act was intended, the administrative regulations had not been complied with, and a copy of General Order 32 was enclosed. More than three months of the period of limitation still remained. Had the libelant, even at that date, filed a proper claim, he could have perfected his right to commence suit under the statute not more than sixty-one days thereafter. The libelant's failure to comply with the statutory condition is, therefore, clear, and the non-compliance substantial."

(a). Contrary to petitioner's contention, WSA General Order 32, insofar as it provides that claims for damages and for maintenance and cure and wages, as distinct from War Risk insurance benefits, are to be filed with the General Agent of the vessel, is both necessary and valid. The Clarification Act provides that the term administratively disallowed "means a denial of a written claim in accordance with rules or regulations prescribed by the Administrator, War Shipping Administration" (50 U. S. C. App. 1291). The Act does not state that the claims are to be passed upon by the Administrator personally, and it is plain that a task of such magnitude must, of necessity, be delegated. In 1943, in the midst of a global war, the most appropriate delegees were the General Agents, who not only were repositories of accident reports, but who also were provided

with the necessary office organization and manpower to determine the validity of the claims filed.

The General Agents, although private corporations, bore the same employee-employer relationship to the United States as any non-corporate employee of the War Shipping Administration. See *Cosmopolitan Shipping Co., Inc.* v. *McAllister*, 337 U. S. 783. Certainly, delegation of this administrative function to non-corporate employees of the War Shipping Administration would be valid. We know of no reason that compels a different conclusion because the delegation was to a corporate employee. Cf. *Sloan Shipyards* v. *U. S. Fleet Corp.*, 258 U. S. 549, 567.

In addition, petitioner can show no prejudice to his rights resulting from such delegation. The General Agent can merely allow or disallow a claim. A libelant obviously suffers no damage if his claim is allowed, and he is provided with a remedy at law against the United States if the claim is disallowed.

(b). Since a proper claim was ultimately submitted after the institution of this libel and the expiration of the two-year period of limitations, petitioner makes the further contention that the court below erred in failing to apply the admiralty doctrine that a libel, prematurely brought, will not be dismissed where the right to enforce the claim is later perfected.[3] But this doctrine cannot apply in

[3] This contention is presumably directed only at the claims for damages, and maintenance and cure and wages. The claim for War Risk Insurance benefits was first set forth in the amended libel of February 5, 1946—leave to amend being granted by the court on December 18, 1945—and is clearly barred by the two-year statute of limitations of the Suits in Admiralty Act, 46 U.S.C. 745.

the face of an express congressional intent to channel the seaman's claim first to the War Shipping Administration for administrative handling and then, after adverse administrative action, to the courts. This statutory scheme is not merely procedural but limits the jurisdiction of the courts, as the Court of Appeals held. It is familiar that such jurisdictional statutes are to be strictly construed.[4]

Moreover, this admiralty principle upon which petitioner relies is based on equitable considerations. Its application lies, therefore, fully within the discretion of the lower court. In our opinion, the court below properly found the equities herein to be against petitioner. "The persistent failure to file a conforming claim when he was well advised in plenty of time to avoid the running of the statute of limitations, indicates clearly, we think, that there is no equitable basis for his contention" (175 F. 2d 479, 482).[5]

---

[4] Petitioner complains that the court below erred in strictly construing the Clarification Act in that the United States was not the real party in interest because the claims were ultimately to be paid by private insurance underwriters. Regardless of the soundness of petitioner's premise, we believe his conclusion that insurance coverage dilutes the rights of the United States to be without any basis in law. In any event, petitioner's premise is unsound. War Risk Insurance is solely a government operation; although claims for damages and maintenance and cure are covered by Protection and Indemnity contracts, all such P & I underwriters are reinsured by the Government pursuant to agreements which further provide for the recapture by the United States of excess profits made by the underwriters, so that ultimately all losses or savings are for the account of the United States.

[5] It should be noted that if the filing of premature suits were permitted, a primary reason for channeling claims first

2. Contrary to the suggestion of petitioner, the decision below does not assume unusual urgency and importance because of the recent decisions of this Court in *Cosmopolitan Shipping Co., Inc.* v. *McAllister,* 337 U. S. 783; *Fink* v. *Shepard Steamship Co.,* 337 U. S. 810; and *Gaynor* v. *Agwilines, Inc.,* 337 U. S. 810. Petitioner contends that, as a result of those decisions, a great many suits against the United States under the Suits in Admiralty Act, which have been held in abeyance pending disposition of actions instituted against General Agents, will presently be prosecuted. Petitioner argues that, as a result of the decision below, thousands of cases may now be dismissed *sua sponte* by the courts because of defects in compliance with General Order 32.[6] But petitioner is in error as to the facts.

---

to the War Shipping Administration would be nullified. Claims against the United States for damages and maintenance and cure and wages are insured by Protection and Indemnity contracts and are defended by the United States Attorneys with the assistance of counsel for P & I underwriters; War Risk Insurance claims are defended by the United States Attorneys with the assistance of the Admiralty and Shipping Section of the Department of Justice. It is important, therefore, that the Government know in advance of suit the precise nature of the claim.

[6] While the United States did not affirmatively plead such a defense, the correspondence between the parties was submitted for consideration by the court. It has always been a federal court's duty to see that it has jurisdiction, since the consent of parties cannot give it, and if necessary to raise the question itself. *United States* v. *Corrick,* 298 U.S. 435, 440; *McNutt* v. *General Motors Acceptance Corp.,* 298 U.S. 178; *KVOS, Inc.* v. *Associated Press,* 299 U.S. 269, *Wetmore* v. *Rymer,* 169 U.S. 115; Rule 12(h)(2), Rules of Civil Procedure. See 5 Cyc. of Federal Procedure (1943 ed.) § 1567.

Suits of both classes are reported to the Admiralty and Shipping Section of the Department of Justice. Contrary to statements made in the petition, prior to the recent decisions of this Court, suit against the United States alone, pursuant to the Clarification Act, was the rule and not the exception. Throughout the United States, approximately only one-fourth of the injured Government seamen instituted suits against General Agents. Again contrary to statements made in the petition, where actions were instituted simultaneously against the United States and the General Agents, it was the general practice of district courts to consolidate the actions rather than to hold the libel against the United States in abeyance pending disposition of the action against the General Agent. Of some 15,000 suits relatively few remain to be tried.

However, even assuming the truth of petitioner's statements, no problems meriting certiorari are thereby raised. The general problem of the filing of proper administrative claims as prerequisite to judicial action has already had decision by this Court. *Angelus Milling Co.* v. *Commissioner,* 325 U. S. 293. The question of compliance with WSA General Order 32 is purely factual, and in this case there can be no doubt that, as the lower courts have held, petitioner filed no claim worthy of that name until May 15, 1945, after the limitations period had run (*supra,* pp. 5-11). There is no conflict in the decisions. See *Militano* v. *United States,* 156 F. 2d 599 (C. A. 2); *Fox* v. *Alcoa S. S. Co.,* 143 F. 2d 667 (C. A. 5), certiorari denied, 323 U. S. 788; *McInnis* v. *United States,* 152 F. 2d 387 (C. A. 9). In each of these cases, as in the instant case,

no general rule of law was laid down as to compliance with General Order 32; in each case, that question was decided upon the particular facts presented by the record before the court. We think it extremely doubtful that the atypical record made in this case permits of a decision by this Court which would be applicable in other litigation.[7] We submit, therefore, that further review is not warranted.

3. Finally, the result reached below is supportable upon another ground. We believe the court below erred in reversing the holding of the district court that the objection to improper venue had not been waived by the United States. Section 2 of the Suits in Admiralty Act, *infra*, p. 24, provides that suit shall be brought in the district court "for the district in which the party so suing, or any of them, reside * * *."[8] The district court found that, contrary to the verified allegations of residence made in the original and amended libels filed by petitioner, petitioner, in fact, did not live in the district in which the libel was brought. In reliance upon the verified libel, the United States admitted, in its original answer, petitioner's allegation of residence within the district. But upon determining that petitioner's allegation was erroneous, the United States, adopting the only course open to it

---

[7] It was the general practice of the War Shipping Administration, and its agents, to accept claims which could properly be called such, but, as we have said, none was forthcoming here until too late.

[8] This provision pertains to venue rather than jurisdiction, and *where residence is not alleged* is waived by failure to object before pleading to the merits. *Hoiness* v. *United States*, 335 U. S. 297.

specifically denied, in its amended answer, petitioner's allegation of residence (RA. 21a) and, at the outset of trial, gave notice of the point and asked that proof be made of residence (Pet. A. 4a). We submit that, in these circumstances, there was no waiver of the improper venue. See *supra*, pp. 12-13. Cf. *Untersinger* v. *United States*, 172 F. 2d 298 (C. A. 2); *Orr* v. *United States*, 174 F. 2d 577 (C. A. 2).

CONCLUSION

The decision below is correct, and there is no conflict of decisions. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

H. G. MORISON,
Assistant Attorney General.

PAUL A. SWEENEY,
LEAVENWORTH COLBY,
BENJAMIN FORMAN,
Attorneys.

OCTOBER 1949.

APPENDIX A

1. The Clarification Act of March 24, 1943, 57 Stat. 45, 50 U.S.C. App. 1291 provides in pertinent part as follows:

* * * * *

(a) Officers and members of crews (hereinafter referred to as "seamen") employed on United States or foreign flag vessels as employees of the United States through the War Shipping Administration shall, with respect to (1) laws administered by the Public Health Service and the Social Security Act, as amended by subsection (b) (2) and (3) of this section; (2) death, injuries, illness, maintenance and cure, loss of effects, detention, or repatriation, or claims arising therefrom not covered by the foregoing clause (1); and (3) collection of wages and bonuses and making of allotments, have all of the rights, benefits, exemptions, privileges, and liabilities, under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels. Such seamen, because of the temporary wartime character of their employment by the War Shipping Administration, shall not be considered as officers or employees of the United States for the purposes of the United States Employees Compensation Act, as amended; the Civil Service Retirement Act, as amended; the Act of Congress approved March 7, 1942 (Public Law 490, Seventy-seventh Congress); or the Act entitled "An Act to provide benefits for the injury, disability, death, or detention of employees of contractors with the United States and certain other persons or reimbursement therefor", approved December 2, 1942 (Public Law 784,

Seventy-seventh Congress). Claims arising under clause (1) hereof shall be enforced in the same manner as such claims would be enforced if the seaman were employed on a privately owned and operated American vessel. Any claim referred to in clause (2) or (3) hereof shall, if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act, notwithstanding the vessel on which the seaman is employed is not a merchant vessel within the meaning of such Act. Any claim, right, or cause of action of or in respect of any such seaman accruing on or after October 1, 1941, and prior to the date of enactment of this section may be enforced, and upon the election of the seaman or his surviving dependent or beneficiary, or his legal representative to do so shall be governed, as if this section had been in effect when such claim, right, or cause of action accrued, such election to be made in accordance with rules and regulations prescribed by the Administrator, War Shipping Administration. Rights of any seaman under the Social Security Act, as amended by subsection (b) (2) and (3), and claims therefor shall be governed solely by the provisions of such Act, so amended. When used in this subsection the term "administratively disallowed" means a denial of a written claim in accordance with rules or regulations prescribed by the Administrator, War Shipping Administration. When used in this subsection the terms "War Shipping Administration" and "Administrator, War Shipping Administration" shall be deemed to include the United States Maritime Commission with respect to the period beginning October 1, 1941, and ending February 11, 1942, and the term "seaman" shall be deemed to include

any seaman employed as an employee of the United States through the War Shipping Administration on vessels made available to or sub-chartered to other agencies or departments of the United States.

* * * * *

2. The Suits in Admiralty Act, 46 U.S.C. 741-752 provides in pertinent part as follows:

> Sec. 2 (46 U.S.C. 742). * * * Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. * * *
>
> Sec. 5 (46 U.S.C. 745). That suits as herein authorized may be brought only on causes of action arising since April 6, 1917: *Provided,* That suits based on causes of action arising prior to the taking effect of this Act shall be brought within one year after this Act goes into effect; all other suits hereunder shall be brought within two years after the cause of action arises * * *

APPENDIX B

General Order 32, 8 Fed. Reg. 5414, issued by the War Shipping Administrator on April 22, 1943, provides in pertinent part as follows:

§ 304.21 *Claims which must be submitted for allowance prior to suit.* Claims, unless covered by the Social Security Act or laws administered by the Public Health Service, must be submitted for allowance prior to instituting court action thereon in cases of death, injury, illness, maintenance and cure, loss of effects, detention, repatriation, or claims arising therefrom; in cases relating to the collection of wages and bonuses and the making of allotments, when made against the United States of America, the War Shipping Administration, the Administrator thereof, or any other person for whom the United States of America or War Shipping Administration is responsible; in cases arising under the War Shipping Administration Crew Life and Injury Policy, the Second Seamen's War Risk Policy, and those arising under other Decisions of the Maritime War Emergency Board, in so far as such claims are made against the War Shipping Administration, provided they are made by or on behalf of seamen who, at the time such claims arose, were employees of the United States through the War Shipping Administration, or by or on behalf of their surviving dependents or beneficiaries or legal representatives.

§ 304.22 *Time of accrual.* These regulations (§ 304.20 et seq.) apply to any claim specified in § 304.21 which:

(a) Arose on or after March 24, 1943; or

(b) Accrued on or after October 1, 1941, and prior to March 24, 1943, if the seaman

or his surviving dependent or beneficiary or legal representative elects, as provided by §§ 304.28 and 304.29, to enforce such claim in the same manner as it would be enforced if it arose after the date of the enactment of Public Law 17—78th Congress.

§ 304.23 *Court action, condition precedent.* No seaman or his surviving dependent or beneficiary or legal representative, having a claim under the provisions of §§ 304.21 and 304.22, shall commence a court action for the enforcement of such claim, unless such claim has been filed by him or on his behalf or by or on behalf of his surviving dependent or beneficiary or legal representative as provided in §§ 304.24 and 304.25 and has been administratively disallowed by the person or agency with whom it was so filed.

§ 304.24 *Claim, contents.* The claim need not follow any particular form, but it shall be in writing. It shall contain such particulars as are reasonably necessary as a basis for the allowance or administrative disallowance of such claim and should include, with respect to the seaman in question, his home address, date of birth, place of birth, certificate of identification number, as well as all the facts and circumstances leading up to and surrounding the happening of the event out of which it is alleged the claim arose.

§ 304.25 *Claims, with whom filed.* Claims based upon any decision of the Maritime War Emergency Board or any insurance policy issued by the War Shipping Administration, excluding claims for loss of or damage to personal effects (if the insured is alive), bonus, and detention and repatriation benefits, shall be filed with the Chief

Adjuster, Division of Wartime Insurance, War Shipping Administration, 99 John Street, New York City, or such other agencies or persons as may be designated by the Chief Adjuster for the purpose of determining the allowance or disallowance of such claim. All other claims, including claims for loss of or damage to personal effects (if the insured is alive), bonus, and detention and repatriation benefits, shall be filed with the General Agent of the vessel with respect to which such claims arose, or such Agent's Berth Sub-Agent to which the former may refer the claim for handling.

§ 304.26 *Claim, when presumed administratively disallowed.* If the person or agency with whom the claim is filed, in accordance with the directions contained herein, fails to notify the claimant in writing of a determination upon such claim, within sixty days following the date of filing thereof, the claim shall be presumed to have been administratively disallowed, and the claimant shall be entitled to enforce his claim by court action.

* * * * *

☆ United States Government Printing Office J860183/256